United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-2026

In The
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UNITED STATES OF AMERICA

Plaintiff-Appellee,

-against-

JOHN FRANZESE

Petitioner-Appellant.

On Appeal from the United StatesDistrict
Court for the Eastern District of New York

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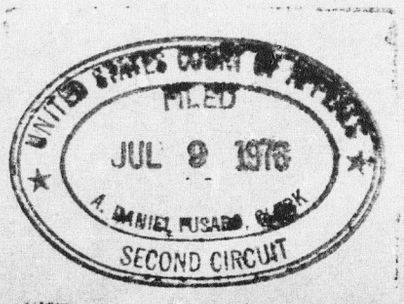

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PRELIMINARY STATEMENT

Moving pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellant petitions this Court to grant him a rehearing en banc from the District Court's denial of his motion, pursuant to 28 U.S.C., Section 2255, and this Court's affirmation of that denial. This petition is based upon the brief previously filed with this Court, along with a two-volume printed appendix and the facts stated in this petition. The appellant asserts three grounds for granting a rehearing:

1. The District Court, in denying appellant's motion, ignored the clear and explicit meaning of appellant's Exhibit 3 in deciding the motion;

2. The District Court made clearly erroneous findings of fact concerning the import and admissibility of the testimony of Mr. Helfand.

3. The District Court ignored the testimony of Ann Zaher, as such testimony directly contradicted the trial testimony of Charles Zaher.

In addition to the areas specifically stated as being based upon erroneous findings of fact, appellant also wishes to bring to this Court's attention a bit of background upon which this decision was reached. At appellant's trial in 1967, there had been extensive testimony concerning the fear in which the four witnesses lived. Subsequent to that trial, there had been several motions before the District Court. Between the date of trial in 1967 and the instant motion commenced on September 29, 1975, there is no known incidence of harm coming to any party connected with the prosecution of the appellant. The appellant has been incarcerated since March of 1970.

The instant motion was filed on September 29, 1975. At that point the District Court issued a material witness war-

rant for Anne Zaher and had her brought before the Court. Mrs. Zaher claimed at that time, in unsworn testimony, that she had destroyed a letter written by her husband, indicating appellant's innocence. [93a-100a] Subsequent to September 29th, that letter was in fact turned over to the attorney for Charles Zaher. [113a]

The Court had set November 7, 1975 as the date for oral argument on whether or not a hearing should be held upon the allegations contained in appellant's moving papers. On November 5, 1975, appellant's son contacted the writer, in his capacity as attorney for John Franzese. Counsel, immediately after speaking with appellant's son, made an appointment to see theCourt. The purpose in so doing was to meet head-on, certain allegations made by agents of the Federal Bureau of Investigation to the appellant's son, to wit, appellant's son was engaged in a plot to kidnap the daughter of the District Court Judge in an effort to gain appellant's freedom. Counsel's purpose in meeting with the Court was to inform the Court of this allegation and to assure the Court that there was no merit to the allegation. [133a-134a] Despite these reassurances, the Court expressed a continuing concern for the safety of his daughter. The disturbing part

of this entire incident was that it served to renew an atmosphere of fear which had permeated the trial of appellant eight years previously.

POINT I

THE DISTRICT COURT, IN DENYING APPELLANT'S MOTION, IGNORED THE CLEAR AND EXPLICIT MEANING OF APPELLANT'S EXHIBIT 3 IN DECIDING THE MOTION

In preparing the instant motion for presentation to the District Court, appellant took great pains to corroborate the allegations of the recanting witness, that perjurious testimony was given at appellant's trial. It was imperative to the success of this motion to overcome a judicial feeling, that all testimony on appellant's behalf was obtained through the payment of money and was, in fact, suborned perjury. [68a, 134a], United States v. Franzese, 525 F.2d 27, 30 (2nd Cir. 1975) In a prior motion the Government had articulated these beliefs, and they had come to be accepted truths of this case.

In August of 1975, Anne Zaher came forward and told counsel for appellant of the existence of a letter in which her husband affirmed "framing John Franzese." [503a] Money was demanded for this letter. The sum of $100,000. was put

forth by Anne Zaher. [42a] Unlike the allegations of Eleanor Cordero in which she stated that she was offered $50,000 to give perjurious testimony, now we have a woman demanding payment for a letter she represents to be authentic.* Capitulation to this demand would have immediately brought forth the document and comported with the Court's belief of a previous offer of $50,000 to Eleanor Cordero. The unwillingness to be blackmailed placed the appellant's motion in a tenuous, to say the least, situation.

When the letter finally did come forth, counsel had it checked for authenticity and brought an expert into Court, to verify the authenticity. In the face of this, the District Court conceded that a plain reading of the letter indicated that the recanting witness and his three co-witnesses fabricated testimony to convict appellant. [383a] In similar language, the District Court had denied an earlier

*The Court should be aware that Eleanor Cordero demanded $132,500 from appellant through counsel to testify in conformity with the previously submitted affidavit after Mrs. Cordero assured counsel such testimony was truthful. This figure was arrived at as follows: $60,000. to purchase house, $50,000 cash, $22,500 for daughter Ellen's education. This demand was similarly rejected.

motion by appellant by stating:

> ".... a plain reading of the memorandum is a simple answer to the claim under Brady."
> 321 F. Supp. 993, 994 (E.D. N.Y. 1970)

However, the Court did not stop with a plain reading of a letter favorable to appellant's cause, as it did in the previous matter where a plain reading defeated appellant's motion, but rather, put a subjective interpretation upon the import of that letter. Such subjective interpretation has no foundation in the record and is used to undercut the persuasive weight of a document authenticated by an outside expert, a plain reading of which supports the appellant's theory of the case since its inception in 1966. [352a, 368a, 447a-448a]

Not only is the letter uncontradicted proof of the witnesses' intention, the negotiations surrounding the production of the letter are highly probative of the contradictions in this case from its inception.

At the initial trial the most damaging testimony against appellant was introduced during the redirect examination of the four witnesses. It was then that each witness explained his failure to initially implicate appellant because of fear for their personal safety. This contradiction was recognized by the Court on November 7, 1975, as follows:

"THE COURT: First she wants $100,000 for the letter. Now Saher was in such fear of his life that he says he left, left town and she's demanding $100,000 of Franzese?

MR. VOTTO: Mr. Saher has lived at the same address since he left prison, his name is in the phone book with his address. This fear, I don't believe it really exists. Anyone that wanted to reach him could. To this day he's still in the phone book. He's lived at that address since he comes out of prison." [121a-122a]

The record does not support any interpretation of Exhibit 3 other than that which a plain reading of the Exhibit conveys. The record convincingly establishes that the witnesses and their spouses are all street-wise individuals attempting to better their own situation in life. To this end John Franzese was a commodity to be bartered by the four witnesses in 1967 for their freedom and in 1975 for Mrs. Zaher's and Mrs. Cordero's financial well being. The witnesses successfully traded their freedom for appellants incarceration in 1967, yet in 1975 when appellant would not agree to purchase testimony, his motion is still judged against beliefs of perjury born from the statements of these witnesses on earlier occasions. The record does not support the subjective interpretation placed upon this letter by the Court and therefore a plain reading of the

letter establishes perjury on the part of a key government witness which requires appellant be granted a new trial.

POINT II

THE DISTRICT COURT MADE CLEARLY ERRONEOUS FINDINGS OF FACT CONCERNING THE IMPORT AND ADMISSIBILITY OF THE TESTIMONY OF MR. HELFAND

In his affidavit and during his testimony, Charles E. Zaher stated that the plot to implicate the appellant was put together by the four witnesses subsequent to their initial testimony characterizing Anthony Polisi as the master-mind of the bank robbers. Finding it necessary to discredit the testimony of Zaher to deny appellant's motion, the District Court held in his Memorandum of Decision:

> "Evidence that would directly contradict Zaher's claim, that the plan to implicate Franzese was hatched after the Polisi trial, was offered through Mr. Helfand's testimony; ..." [391a]

This finding by the Court is highly misleading and clearly erroneous. Mr. Helfand was an attorney hired to represent John Cordero during certain proceedings below. On redirect examination, the prosecution attempted to elicit testimony from Mr. Helfand supporting their theory that Cordero had implicated appellant immediately after Cordero's arrest. The testimony the prosecution sought from Helfand

was that on the attorney's first conference with his client, John Cordero, the client implicated Franzese. That testimony was given by Mr. Helfand. However, Mr. Helfand could not state when his first meeting with Mr. Cordero took place. His testimony would only be relevant if the Government could establish that the Helfand conversation with Cordero took place prior to a motive to fabricate and thus the conversation would have had to have been before the Polisi trial took place in January of 1966. Helfand could not so testify. [458a- 466a] Because Helfand could not pinpoint the date, the Court sustained an objection to the admission of his testimony.

Helfand, rather than contradicting Zaher's allegations, corroborates them. The records of the case are clear that the attorney of record for John Cordero from October 1965 through April 29, 1966 was Rudy DiBlasi and that Mr. Helfand filed his Notice of Appearance on behalf of Mr. Cordero on April 29, 1966. [4a, 7a, 8a, 25a, 26a]

Assuming that Robert Helfand testified truthfully at appellant's trial that Cordero implicated appellant in his first conversation with Helfand, the records of the case establish Helfand's involvement with Cordero commencing in

April 1966. If the first conversation took place in April 1966, it is obvious that the plot to implicate Franzese was concocted between October 1965 and April 1966, and Zaher's testimony is thereby corroborated. Therefore, the Court was clearly erroneous in holding the Helfand testimony con0 tradictory to that of Charles Zaher.

POINT III

THE DISTRICT COURT IGNORED THE TESTIMONY OF ANN ZAHER, AS SUCH TESTIMONY DIRECTLY CONTRADICTED THE TRIAL TESTIMONY OF CHARLES ZAHER.

Ann Zaher's testimony relative to her husband's activities in 1965 corroborates his recantation that he was not at a meeting with the appellant at the Aqueduct Motor Inn in July, 1965. Charles Zaher testified at appellant's trial that he met at the Aqueduct Motor Inn with the appellant between July 19 and July 23 of 1965. Subsequent to this meeting, he states he stayed in certain unnamed motels in and around Queens, New York, for a week, and then on July 29th took his family away on a week's vacation. Ann Zaher testified that the family went away for approximately two weeks, they left sometime around July 20th and that they made stops along the route upstate. To corroborate her story, Mrs. Zaher presented a postal card dated July 30, 1965 from North Pole, New York,

that it took her eight days to get to North Pole, further testifying that she visited a doctor on July 17, 1965 and left on her vacation within four days of that visit. [326a- 330a]

Ann Zaher is a witness who is not friendly to appellant's cause. She did everything in her power to obstruct the presentation of appellant's motion. Having failed to do so, she was called to the witness stand as a reluctant, if not hostile, witness. Her testimony, when viewed in this light, is highly corroborative of her husband recantation, and failure to discuss the import of this testimony in his Memorandum of Decision was clear error on the part of the District Court.

CONCLUSION

Appellant was sentenced to fifty years in jail upon the testimony of four self-confessed bank robbers. The Government presented no corroboration against appellant at his trial. When, in 1975, a witness came forward and said he lied, appellant used the full plenary of court process open in order to bring to light the fraudulent nature of his conviction. In our country every man, no matter who he is or what he is alleged to be, has the right to a fair

trial. There can be no fair trial when perjured testimony is given. There can be no fair judgment when subjective interpretations are placed on corroborative documents supporting the recantation. The appellant is entitled to a rehearing before this Court en banc to have resolved the plain meaning of Exhibit 3 as it relates to the testimony of Charles Zaher, Richard Parks, John Cordero and James Smith.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, MICHAEL B. POLLACK, do hereby certify that a true copy of the Petition for a Rehearing en banc was placed in the mail to Mr. David G. Trager, United States Attorney, 225 Cadman Plaza East, Brooklyn, New York, on July 9, 1976, at 5:00 o'clock P.M.

DATED: New York, N.Y., July 9, 1976

MICHAEL B. POLLACK

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